Dave Flynn

Re: Local 93
v Cleveland

Memorandum

Subject	Date
Vanguards argument	February 11, 1986 WB:bj DJ 170-57-153

To: Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

From: Walter W. Barnett
Deputy Chief, Appellate Section
Civil Rights Division

You asked for a copy of our filing at the petition stage in Vanguards; one is attached.

You also asked for brief descriptions of the Chicago and Philadelphia cases; in each of these the Supreme Court denied a petition for a writ of certiorari on January 13, 1986.

Chicago

In Bigby v. City of Chicago, a panel of the Seventh Circuit (Posner writing for himself, Cudahy and Pell) held that a denial of promotion is not a deprivation of liberty or property within the meaning of the Due Process Clause.

This decision arose in the context of what was initially a Title VII suit by black police sergeants who claimed that a promotion test had adverse racial impact and was not validated. The blacks prevailed, but their part of the case was not taken to the court of appeals. While the initial claim was pending in the district court, a group of white and Hispanic sergeants was allowed to intervene, challenging the same test on Due Process grounds as not sufficiently job-related irrespective of any racial impact. The district court dismissed their claims as non-meritorious.

It was the appeal from this dismissal that led to the Seventh Circuit's decision summarized above.

Accordingly, the only question presented to the Supreme Court (Thoele v. Chicago, No. 85-574) was whether government employees have a protected property or liberty interest in the procedures used to determine promotions.

Philadelphia

In Commonwealth of Pennsylvania v. Local 542, a panel of the Third Circuit (per curiam; Adams and Hunter, Circuit Judges, and Fisher, District Judge) held that Stotts was not applicable to a decree entered under both Title VII and Section 1981 in which a district court had entered certain numerical relief in favor of minorities. The court of appeals distinguished Stotts on several grounds. First, Stotts concerned the modification of a consent decree, while Local 542 involves a decree entered to remedy a judicial finding of intentional class-wide discrimination. Second, Stotts involves a bona fide seniority system while here the referral system at issue (which operates on seniority principles) was found not to be bona fide. Third, Local 542 involves intentional class-wide discrimination and the relief was predicated in part on Section 1981: the Supreme Court expressly left open whether wider relief may be available under Section 1981 than under Title VII (see Stotts n. 16).

Local 542 petitioned (No. 85-828), arguing that all these differences were not sufficient to distinguish this quota case from Stotts. Respondents argued that the order at issue had expired on August 31, 1985. They noted that the order was extended for two more years, based in part upon a finding that Local 542 had been in contempt. They also noted that the two year extension was being challenged by Local 542 in proceedings in both the district court and the court of appeals.

Accordingly, it appears the denial of Local 542's petition can most sensibly be read as based on timing considerations.

Filed March

No. 84-1999

In the Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C., PETITIONER

v.

CITY OF CLEVELAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a consent judgment in an action brought under Title VII of the Civil Rights Act of 1964 against a public employer may award racial preferences in promotions to persons who are not the actual victims of the employer's discrimination.

2. Whether a consent judgment may be entered over the objection of an intervenor of right whose interests are adversely affected by the terms of the consent judgment.

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INTEREST OF THE UNITED STATES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits, inter alia, racial discrimination in employment. The Attorney General is responsible for enforcement of Title VII where, as here, the employer is a government, governmental agency, or political subdivision. 42 U.S.C. 2000e-5(f)(1). This Court's resolution of the issues presented in this case will accordingly have a substantial effect on the Attorney General's enforcement responsibilities. The federal government, which is the nation's largest employer, is also subject to the requirements of Title VII in that capacity. 42 U.S.C. 2000e-16.

In cases that present questions similar to the instant case and that are or shortly will be before this Court, federal agencies are involved as parties, in one case as the plaintiff that sought enforcement of Title VII against offending unions[1] and in the other as a defendant sued

[1] *Local 28 of the Sheet Metal Workers' International Association* v. *EEOC*, petition for cert. pending, No. 84-1656. In that case, the

for alleged employment discrimination.[2] We urge review in the present case because in our judgment the legal issues are posed here free from obscuring complexities.

STATEMENT

In 1980, the Vanguards of Cleveland (Vanguards), an association of black and Hispanic firefighters employed by the City of Cleveland, brought a class action in the United States District Court for the Northern District of Ohio, alleging that the Cleveland Fire Department had discriminated in promotions, in violation of the Thirteenth and Fourteenth Amendments, 42 U.S.C. 1981 and 1983, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The complaint charged the City with using unfair written tests and seniority points, manipulating retirement dates with respect to the dates on which promotion eligibility lists expired, and failing to hold promotional examinations since April 1975 (Pet. App. A2). The complaint also alleged that blacks and Hispanics were underrepresented in the ranks of lieutenant and above (*ibid.*). The complaint sought a declaratory judgment, an injunction prohibiting the continuation of discriminatory practices, and the institution of a hiring and promotion program for blacks and Hispanics (Pet. App. A2-A3).

Second Circuit gave this Court's decision in *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984), a narrow interpretation. The Commission will be filing a response asking that the petition in that case be held pending disposition of the present case. Neither the Commission nor the United States urges that the Court review the decision in that case because of its factual and procedural complexities, including the fact that the remedial issue is presented in the context of a contempt proceeding.

[2] In *Turner* v. *Orr*, 759 F.2d 817 (11th Cir. 1985), which involves a consent decree entered into by the Air Force, the government intends to file a petition for a writ of certiorari and to suggest that its petition be held pending disposition of the present case. We urge plenary review in the present case, rather than *Turner*, because *Turner* poses a potentially dispositive threshold question regarding the correct interpretation of the consent decree.

Shortly after the complaint was filed, the parties began negotiations. In 1981, petitioner (Local Number 93, International Association of Firefighters, the collective bargaining representative of all of the Cleveland firefighters) successfully moved for intervention of right under Fed. R. Civ. P. 24(a)(2). Petitioner alleged that "[p]romotions based upon any criteria other than competence, such as a racial quota system," would be discriminatory. Pet. App. A3.

In November 1982, the parties reached a tentative settlement, but this agreement was rejected by a vote of 88% of the membership of petitioner. The Vanguards and the city then negotiated a settlement to which petitioner strongly objected. The collective bargaining agreement between the city and petitioner, as well as the civil service rules, provided for promotions to be made primarily on the basis of test scores, with extra points granted for seniority. Under the proposed settlement, however, a preference was given to any "minority" (*i.e.*, black or Hispanic) firefighter who passed the promotional exams, regardless of whether he or she was the actual victim of discrimination. During the first stage of the decree, approximately 50% of all promotions were to go to minority candidates. The city was ordered to certify lists of those eligible for promotion based on the last exam and to make a large number of promotions no later than February 10, 1983. Pet. App. A33-A34. In making these promotions, the city was required to pair the highest ranking minority and non-minority candidates on the lists (*id.* at A34).[3] The second stage was to begin after certification of the eligible lists based on the next exam and was to continue until December 1987. The settlement set statistical "goals" to be achieved during this

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[3] If there were not enough eligible minority firefighters to fill the 33 lieutenant slots reserved for minority candidates, the unfilled slots were to be given to non-minorities. In that event, all future appointments to the rank of lieutenant from the next eligible list were to go to minority firefighters until the "shortfall" was made up. Pet. App. A34.

period for each rank and required that minority candidates be promoted "out of eligible list rank" if necessary to achieve these goals (Pet. App. A36).[4]

The district court entered this agreement as a "consent" judgment while expressly acknowledging that petitioner did not consent (Pet. App. A31). The court purported to retain exclusive jurisdiction over any attempt by petitioner or any other party to enforce, modify, amend, or terminate the decree (*id.* at A38). The court also provided that the decree was to supersede any conflicting provisions of state or local law (*id.* at A37).

Petitioner appealed, but a sharply divided panel of the Sixth Circuit affirmed (Pet. App. A1-A28), holding that "the district court did not abuse its discretion in finding that the consent decree was fair, reasonable and adequate" (*id.* at A10). In support of this conclusion, the court of appeals first noted that it had been conceded that there had been past discrimination by the fire department and that minorities were statistically underrepresented in the department's higher ranks (*ibid.*). The court also emphasized that non-minority firefighters would not be fired and were not absolutely barred from promotion (*id.* at A11). Finally, the court observed (*ibid.*) that the city was not required to promote unqualified minority firefighters, that the percentage "goals" were subject to modification under certain circumstances, and that the plan was scheduled to remain in effect for a limited period.

The court of appeals held (Pet. App. A12) that *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984), had "no effect" on this case for two reasons: first, because here the decree did not totally abrogate the seniority system (Pet. App. A13) and, second, because the decree was a "consent" judgment rather

[4] For the period following the 1984 exam, the goals were as follows: 20% for assistant chief; 10% for battalion chief; 10% for captain; 23% for lieutenant. Pet. App. A35.

For the period after the 1985 exam, the following goals were imposed: 20% for ranks above lieutenant and 25% for the rank of lieutenant. Pet. App. A35-A36.

than a judgment entered after adjudication of the suit (*id.* at A13-A20). The court likened this "consent" decree to a voluntary affirmative action plan such as that in *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979). Pet. App. A16-A17; see also *id.* at A9-A12.

Judge Kennedy dissented "because the language and reasoning of * * * *Stotts* indicate that the consent decree in the present case should be governed by the principles applicable to court-ordered relief rather than those applicable to purely voluntary actions" (Pet. App. A20-A21). She first explained (*id.* at A21) that under *Stotts* "if the present case had gone to trial and the plaintiffs had proven a pattern or practice of discrimination in promotions in violation of Title VII, the District Court could not have ordered relief equivalent to the provisions of the consent decree." *Stotts*, she wrote (Pet. App. A20), interpreted Section 706(g) of Title VII to mean that "when fashioning relief for a violation of Title VII a court [is] limited to making whole those found to have been victims of past discrimination." [5]

Having found that the quota relief at issue in this case could not have been awarded had the case gone to trial, Judge Kennedy concluded, in reliance on *Stotts* and *System Federation No. 91* v. *Wright*, 364 U.S. 642 (1961), that this relief could not be awarded in a consent decree. She noted that a consent decree is a court order and consequently has a legal stature far exceeding a mere contract (Pet. App. A26). She concluded (*id.* at A28):

> Under the Supreme Court's decision in *Stotts*, a court may not enter relief of the type embodied in the consent decree in this case. Since the power to enter a consent decree purporting to enforce a statute is drawn from that statute, it is incongruous to approve a consent decree that goes far beyond the scope of relief permissible under the statute.

[5] Judge Kennedy also disputed (Pet. App. A21-A22) the panel majority's view that the present case does not involve an abrogation of seniority rights. She concluded that here, as in *Stotts*, "[t]he consent decree * * * in effect gives minority firefighters superseniority over all non-minority firefighters."

DISCUSSION

This case presents recurring and important questions regarding the type of relief permitted in Title VII suits, as well as the use of consent decrees in public law litigation and their enforcement against nonconsenting parties.

This is one of a series of recent lower court decisions upholding quota relief and giving this Court's decision in *Stotts* what we regard as an overly narrow interpretation. In the most recent of these cases, the First Circuit candidly acknowledged (*Deveraux* v. *Geary*, No. 84-2004 (June 24, 1985), slip op. 18): "[T]his is a difficult and sensitive area in which we and the other circuit courts could be mistaken in our reading of current precedent." However, the First Circuit declined to depart from pre-*Stotts* precedent "until the Supreme Court has shed more light in this area" (*ibid.*). Unless corrected, this growing body of lower court precedent will have a major continuing impact, sanctioning both the continued implementation of old decrees and the entry of new judgments that may ultimately have to be overturned. We therefore submit that prompt review of the lower courts' interpretation of *Stotts* is warranted and needed.

The instant case is especially appropriate for review because it presents with particular clarity (see pages 1-2, notes 1, 2, *supra*) the two most commonly recurring grounds offered by the lower courts to justify the post-*Stotts* imposition of racial and ethnic quotas: (1) that this Court's decision in *Stotts* disapproved of quota relief only where it abrogates a bona fide seniority system protected under Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h), and (2) that in any event relief awarded in a consent decree need not conform to statutory restrictions governing relief in litigated cases. This latter proposition is of importance in many areas of the law besides Title VII and concerns a question that is a source of considerable confusion and disagreement among the courts of appeals.

The need for closer judicial scrutiny of so-called "consensual" relief is highlighted in the present case because

here the "consent" decree was imposed over the strenuous objection of a union intervenor whose members are seriously and adversely affected by the terms of the decree. The lower court precedent sanctioning the entry of "consent" decrees over the objection of an intervening union is a harsh complement to the companion doctrine that a union and non-minority employees who do not intervene in an employment discrimination case are barred from "collaterally" challenging the decree in any subsequent proceeding. *Ashley* v. *City of Jackson*, No. 82-1390 (Oct. 11, 1983) (Rehnquist and Brennan, JJ., dissenting from the denial of certiorari).

1. The unambiguous meaning of *Stotts*, in our view, is that a court in a Title VII suit may not award affirmative equitable relief to non-victims at the expense of innocent third parties. In *Stotts*, the district court modified a Title VII consent decree over the objection of the employer, the City of Memphis. This modification prohibited the City from following its seniority system in determining who must be laid off insofar as application of that system would decrease the proportion of black employees. As a result, some "non-minority employees with more seniority than minority employees were laid off or demoted in rank" (*Stotts*, slip op. 4). This Court reversed. After first holding (*id.* at 10-12) that the modification went beyond merely enforcing the agreement of the parties as reflected in the consent decree, the Court then concluded (*id.* at 12-20) that the layoff quota was a type of relief "that could not have been ordered had the case gone to trial and the plaintiffs proved that a pattern or practice of discrimination existed" (*id.* at 16). Relying on *Teamsters* v. *United States*, 431 U.S. 324 (1977), and *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), the Court held that it was improper under Section 706(g) of Title VII for the court to award protection against lay-offs because of mere membership in the disadvantaged class (*Stotts*, slip op. 15-20).[6]

[6] Section 706(g) provides, in pertinent part: "No order of the court shall require * * * the hiring, reinstatement, or promotion

The Court expressly reaffirmed its rulings in *Franks* and *Teamsters* that the policy underlying Section 706(g) "is to provide make-whole relief only to those who have been actual victims of illegal discrimination" (*Stotts*, slip op. 16-17). The Court discussed the legislative history of Section 706(g) at length and noted that during the legislative debates opponents of Title VII had charged that "if the bill were enacted, employers could be ordered to hire and promote persons in order to achieve a racially-balanced work force even though those persons had not been victims of illegal discrimination" (*Stotts*, slip op. 16-17) (footnote omitted)). As the Court observed (*id.* at 18), responses to those charges by supporters of the bill made "clear that a court was not authorized to give preferential treatment to non-victims" (*id.* at 18). The Court also cited repeated statements by the bill's supporters reflecting Congress's clear intent that "*Title VII does not permit the ordering of racial quotas* * * *" (*ibid.*, quoting 110 Cong. Rec. 6566 (1964) (emphasis added by Court)).[7]

Since *Stotts*, six courts of appeals have commented on the meaning of *Stotts*, and without exception they have given it a narrow interpretation. See Pet. App. A12-A20; *Deveraux*, slip op. 8-19; *Turner* v. *Orr*, 759 F.2d

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of an individual as an employee * * * if such individual * * * was refused employment or advancement * * * for any reason other than discrimination on account of race * * *." 42 U.S.C. 2000e-5(g).

[7] This congressional understanding regarding the remedial powers of courts in Title VII cases was perhaps most succinctly expressed in a bipartisan newsletter prepared by the principal Senate sponsors of the bill and distributed to supporters during an attempted fillibuster. The newsletter stated "[u]nder Title VII, not even a court, much less the Commission, could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title" (*Stotts*, slip op. 18, quoting 110 Cong. Rec. 14465 (1964) (footnote omitted)). In addition to the portions of the legislative history cited in *Stotts*, see similar statements at 110 Cong. Rec. 1518, 5094, 6563, 7207 (1964).

817, 823-826 (11th Cir. 1985);[8] *EEOC* v. *Local 638*, 753 F.2d 1172, 1186 (2d Cir. 1985), petition for cert. pending, No. 84-1656;[9] *Diaz* v. *AT & T*, 752 F.2d 1356, 1360 n.5 (9th Cir. 1985); *Van Aken* v. *Young*, 750 F.2d 43, 45 (6th Cir. 1984); *Wygant* v. *Jackson Board of Education*, 746 F.2d 1152, 1157-1158 (6th Cir. 1984), cert. granted, No. 84-1340 (Apr. 15, 1984);[10] *Kromnick* v. *School District*, 739 F.2d 894, 911 (3d Cir. 1984), cert. denied, No. 84-606 (Jan. 7, 1985); *Grann* v. *City of Madison*, 738 F.2d 786, 795 n.5 (7th Cir. 1984), cert. denied, No. 84-304 (Oct. 15, 1984).[11] As the First Circuit acknowledged may be the case (*Deveraux*, slip op. 18), we submit that the courts of appeals have indeed misapprehended the import of *Stotts* and that intervention by this Court is needed.

While the courts of appeals have found several grounds for distinguishing and limiting *Stotts*,[12] the two grounds upon which the court of appeals in this case relied are

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[8] See page 2, note 2, *supra*.

[9] See page 1, note 1, *supra*.

[10] *Wygant* is limited to claims under the Fourteenth Amendment and presents no Title VII issues. See U.S. Br. as Amicus Curiae at 3 & n.5, *Kromnick* v. *School District*, *supra*. However, if our position on the Equal Protection Clause issue raised in *Wygant* is correct, the relief awarded in the present case is unconstitutional. See especially U.S. Br. at 26-30. (We are serving copies of our brief in *Wygant* on the parties in this case.)

[11] Several of these decisions, while misinterpreting *Stotts* in other respects, correctly held that *Stotts* did not address the validity vel non of provisions of a voluntary affirmative action plan not embodied in a consent decree. *Van Aken* v. *Young*, 750 F.2d at 45; *Kromnick* v. *School District*, 739 F.2d at 911; *Grann* v. *City of Madison*, 738 F.2d at 795 n.5. As these courts recognized, the validity of such measures under Title VII is governed by *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979).

[12] In addition to the decisions limiting *Stotts* to contested cases involving seniority rights, there are decisions indicating that *Stotts* applies only when no statutory violation has been found or conceded (*Deveraux*, slip op. 14; *EEOC* v. *Local 638*, 753 F.2d at 1186), only when the relief adversely affects identifiable innocent third parties (*Turner* v. *Orr*, 759 F.2d at 824), and only when the relief is retrospective (*EEOC* v. *Local 638*, 753 F.2d at 1186).

employed most frequently. First, the court below held that *Stotts* does not apply to consent decrees. Pet. App. A13-A20; see also *Deveraux*, slip op. 14; *Turner* v. *Orr*, 759 F.2d at 824. We will discuss this question below (see pages 12-20, *infra*). In addition, six courts of appeals, including the Sixth Circuit in the present case have stated that *Stotts* applies only when seniority rights are abridged. Pet. App. A13; *Turner* v. *Orr*, 759 F.2d at 824; *EEOC* v. *Local 638*, 753 F.2d at 1186; *Diaz* v. *AT & T*, 752 F.2d at 1360 n.5 (dicta); *Van Aken* v. *Young*, 750 F.2d 43, 45 (6th Cir. 1984) (dicta); *Kromnick* v. *School District*, 739 F.2d at 911 (dicta); *Grann* v. *City of Madison*, 738 F.2d at 795 n.5 (dicta). As Judge Kennedy noted in dissent below, seniority rights were infringed in the present case (Pet. App. A22), and in any event this basis for distinguishing *Stotts* is legally unsound.

The pivotal issue in *Stotts* was the type of relief that a court may award in a Title VII suit. Section 706(g), which broadly governs *all* relief in Title VII cases and is not limited to relief affecting seniority rights, speaks directly to this question.[13] As the Court stated in *Stotts*, Section 706(g) empowers federal courts in Title VII cases "to provide make-whole relief *only* to those who have been actual victims of illegal discrimination." *Stotts*, slip op. 16-17 (emphasis added).

In limiting *Stotts* to relief infringing seniority rights, the courts of appeals have pointed to *Stotts*'s discussion of Section 703(h), which provides that it is not unlawful for an employer to abide by a bona fide seniority system. See Pet. App. A14; *Turner* v. *Orr*, 759 F.2d at 824; *Kromnick* v. *School District*, 739 F.2d at 911. But as this Court expressly held in *Franks* (424 U.S. at 758), Section 703(h) merely "delineates which employment practices are illegal * * * and which are not"; it does not "proscribe relief otherwise appropriate under the remedial

[13] See page 7, note 6, *supra*.

provisions of Title VII, § 706(g), * * * where an illegal discriminatory act or practice is found."

Both the majority and dissenting opinions in *Stotts* reflect this understanding of the meaning of Sections 703(h) and 706(g). The majority discussed Section 703(h) in connection with the question whether the seniority system was bona fide (*Stotts*, slip op. 13-14), but the portion of the majority opinion devoted to the type of relief allowed under Title VII (*Stotts*, slip op. 14-20) repeatedly referred to Section 706(g) and made only one passing reference in a footnote to Section 703(h).[14] Similarly, the relevant portion of the dissenting opinion (*Stotts*, slip op. 19-29) extensively discussed Section 706(g), while making no reference to Section 703(h). And in principle a reading of *Stotts* limited to relief infringing seniority interests is not rational. Seniority rights are, to be sure, an important aspect of a worker's bundle of expectations regarding his job; but so are the expectations regarding promotion involved here. Those expectations are sacrificed under the promotion quota in this case no less than were seniority rights under the layoff quota at issue in *Stotts*; and in both cases these sacrifices were made to persons who have not themselves suffered discrimination by the defendant employer.[15]

[14] See *Stotts*, slip op. 20 n.17. The Court referred to "statutory policy * * * here, §§ 703(h) and 706(g) of Title VII."

[15] While the relevant portion of the majority opinion in *Stotts* did rely significantly on *Franks* and *Teamsters*—cases involving both Sections 706(g) and 703(h)—it seems clear that the majority was referring solely to the portions of those decisions concerning the remedial question governed by Section 706(g). In *Teamsters*, Part II of the opinion of the Court (431 U.S. at 334-356) discussed the legality of the conduct of the employer and the union, as well as the validity of the seniority system. It was in this portion of the opinion that Section 703(h) was discussed. Part III of the opinion (431 U.S. at 356-377), which discussed the remedial question, made no reference to Section 703(h), but instead made repeated references (431 U.S. at 359, 362, 364, 366, 372) to the sections of *Franks* concerning Section 706(g) (see 424 U.S. at 762-779). The *Stotts* majority cited only Part III of *Teamsters* (*Stotts*, slip op. 16, citing 431 U.S. at 367-371, 371-376).

2. a. The majority below also held that *Stotts* does not govern the present case because the order at issue here has been labeled a "consent" decree. For this reason, the court viewed the promotion quota as "voluntary," and held that Section 706(g)'s limitations on "coercive" remedial orders do not apply. Pet. App. A19-A20.

The majority's analysis is founded on a misconception of the nature of a consent decree. While a consent decree has some contractual attributes (*United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975)), it nonetheless represents an invocation of the coercive power of a federal court,[16] and it therefore has legal consequences far different from a mere contract. As Judge Kennedy explained in dissent below (Pet. App. A26), noncompliance with a consent decree is punishable by contempt, and the court retains jurisdiction to interpret and modify the decree. See also *SEC* v. *Randolph*, 736 F.2d 525, 528 (9th Cir. 1984). In addition, in the "consent" decree in this case, the employer agreed to alter the collective bargaining agreement without the union's consent, an act that would generally constitute an unfair labor practice under federal labor law. *W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 771 (1983). The "consent" decree at issue here also contains a provision superseding the constitution, statutes, and regulations of the State of Ohio, as well as all conflicting local laws (Pet. App. A37). Only a judgment whose force derives from federal law can have such preemptive effect.

Because a consent decree is a judicial act, it may not exceed the bounds of judicial authority. It has long been established, for example, that the court entering the

[16] *Pope* v. *United States*, 323 U.S. 1, 12 (1944); *United States* v. *Swift & Co.*, 286 U.S. 106, 115 (1932); cf. *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 83-84 (1981). As the Seventh Circuit recently recognized (*Donovan* v. *Robbins*, 752 F.2d 1170, 1176 (1985)), parties can always settle a case on their own terms by filing a stipulation of dismissal under Fed. R. Civ. P. 41(a)(1) because this disposition, unlike a consent decree, "will not affect (not demonstrably, anyway) third parties or involve the judge in carrying out the underlying settlement".

decree must have subject matter jurisdiction (*Swift & Co.* v. *United States*, 276 U.S. 311, 324 (1928)) and that any relief must be "within the general scope of the case made by the pleadings" (*Pacific R.R.* v. *Ketchum*, 101 U.S. 289, 297 (1879)). Similarly, in *System Federation No. 91* v. *Wright, supra*, this Court enunciated the simple but important principle that a consent decree may not award relief that exceeds statutory limitations and is "in conflict with statutory objectives" (364 U.S. at 651).

In *System Federation*, employees had brought suit some years earlier under a provision of the Railway Labor Act prohibiting discrimination by employers against nonunion employees, and the defendants—a railroad company and several unions—had agreed to a consent decree forbidding such discrimination. The statute subsequently was amended to permit union shops, and a union moved to modify the decree to reflect this amendment. The lower courts denied the motion, reasoning that since nonunion shops remained legal, the parties' agreement could be enforced.

This Court reversed, holding that failure to modify the decree "would be to render protection in no way authorized by the needs of safeguarding statutory rights" (364 U.S. at 648). The Court explained that the parties' agreement and consideration were not enough to sustain the decree because "it was the Railway Labor Act, and only incidentally the parties, that the District Court served in entering the consent decree now before us. * * * The parties have no power to require of the court continuing enforcement of rights the statute no longer gives" (*id.* at 651-652). The Court concluded (*id.* at 652-653): "The type of decree the parties bargained for is the same as the only type of decree a court can properly grant—one with all those strengths and infirmities of any litigated decree * * *. [T]he court was not acting to enforce a promise but to enforce a statute."

The *Stotts* decision reaffirmed this principle, stating (slip op. 13 n.9):

> "[T]he District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce," not from the parties' consent to the decree. *System Federation No. 91* v. *Wright*, 364 U.S. 642, 651 (1961).

The Court made this statement in response to Justice Stevens's analysis that "[i]f the consent decree justified the District Court's preliminary injunction, then that injunction should be upheld irrespective of whether Title VII would authorize a similar injunction" (*Stotts*, slip op. 2 (Stevens, J., concurring)). The dissent made a similar suggestion (see slip op. 19-20 (Blackmun, J.)).[17]

The principle recognized in *System Federation* and reaffirmed in *Stotts* clearly means that a Title VII consent decree must conform to the policy of Section 706(g), which is "to provide make-whole relief *only* to those who have been actual victims of discrimination" (*Stotts*, slip op. 16-17 (emphasis added)). Providing relief to non-victims not only goes beyond what the statute authorizes; such relief is contrary to what Section 706(g) expressly and unambiguously forbids. This is precisely what we understand this Court to have meant in *Stotts* when it stated that awarding preferences to non-victims would be "inconsistent with" Title VII (slip op. 13 n.9) and "counter to statutory policy" (*id.* at 20 n.17).

Judicial entry of a Title VII consent decree granting preferences to nonvictims is no different in principle from the entry of a consent decree contravening any other congressionally imposed limitation on statutory relief. For example, a provision of the Norris-LaGuardia Act, 29 U.S.C. 104, prohibits federal courts from issuing certain injunctive relief in labor disputes. It seems clear that the parties to a lawsuit brought under the Norris-LaGuardia Act cannot by their consent grant to a federal court remedial power to issue an injunction exceeding the restrictions statutorily imposed by Congress.

[17] In *Stotts*, both the three dissenting Justices and the one concurring Justice interpreted the majority opinion as saying that a consent decree cannot provide relief that would be unavailable after trial. See *Stotts*, slip op. 20 n.9 (Blackmun, J., dissenting) ("The Court's analysis seems to be premised on the view that a consent decree cannot provide relief that could not be obtained at trial."); *id.* at 2 n.3 (Stevens, J., concurring) ("The Court seems to suggest that a consent decree cannot authorize anything that would not constitute permissible relief under Title VII.").

Despite *System Federation*, the decisions of the courts of appeals evidence considerable confusion and disagreement regarding the question whether statutory restrictions on judicial relief apply to consent decrees. As previously noted, three court of appeals decisions, including that in the instant case, have held that Section 706(g)'s remedial limitations do not apply to consent decrees, and a similar approach has been taken by courts of appeals in other important contexts.[18] Other court of appeals decisions, however, are more faithful to the principle that consent decrees must honor statutory and other legal restrictions on the permissible scope of relief.[19] In view

[18] For example, the District of Columbia Circuit recently articulated the following murky formulation regarding the restrictions on relief awarded in consent decrees: "[T]he focus of the court's attention in assessing the agreement should be the purposes which the statute is intended to serve, rather than the interests of each party to the settlement." *Citizens for a Better Environment* v. *Gorsuch*, 718 F.2d 1117, 1125 (1983), cert. denied, No. 83-1345 (May 29, 1984). See also *Sansom Committee by Cook* v. *Lynn*, 735 F.2d 1535, 1538 (3d Cir. 1984), cert. denied, No. 84-232 (Nov. 13, 1984). But see *Citizens for a Better Environment* v. *Gorsuch*, 718 F.2d at 1131 (Wilkey, J., dissenting) (A "court can only enter as a consent decree such relief as would have been within its jurisdictional power had the case gone to trial.").

[19] See *Washington* v. *Penwell*, 700 F.2d 571 (9th Cir. 1983) (consent decree inconsistent with Eleventh Amendment unenforceable); *Gomes* v. *Moran*, 605 F.2d 27 (1st Cir. 1979) (consent decree regarding prisoner transfers modified so as not to exceed due process requirements and so as to preserve state's ability to respond to emergencies); *Theriault* v. *Smith*, 523 F.2d 601 (1st Cir. 1975) (consent decree correctly modified because it granted AFDC benefits not authorized by statute as construed by this Court). Cf. *Roberts* v. *St. Regis Paper Co.*, 653 F.2d 166, 172-175 (5th Cir. 1981) (court of appeals does not reach question whether consent decree must be modified in order to conform to *Teamsters*, because validity of seniority system not yet litigated); *United States* v.

of this disagreement and the importance of consent decrees in a wide variety of cases, there is a substantial need for elucidation by this Court of the permissible scope of relief in a consent decree.

b. Title VII consent decrees should conform to the remedial policy of Section 706(g) because vital interests of innocent employees are at stake. It is one thing for consenting parties to enter into a consent decree affecting only their own rights. But a Title VII consent decree awarding preferences in hiring, promotions, seniority, or lay-offs to "minority" employees or prospective employees necessarily disadvantages those individuals who are not preferred. Neither the plaintiffs who sought such relief nor the employer who acceded to it can be counted on to protect the interests of the individuals who are disadvantaged by the decree. The employer may be all too willing to sacrifice the rights and interests of some employees or prospective employees in order to settle burdensome and costly litigation. Indeed, the employer may find it advantageous to barter away the rights of some present or prospective employees in exchange for relinquishment by the plaintiffs of their monetary claims. In addition, a public employer responsible to an electorate in which "minorities" predominate may have a strong incentive to enter into a consent decree awarding preferential treatment to "minority" group members. If the relief available in a Title VII consent judgment is not subject to statutory limitations and if the courts do not police those limitations, the legitimate rights and interests of employees who do not belong to the favored groups will frequently be sacrificed.

In a related context, this Court has emphasized that an employer may not unilaterally bargain away in a Title VII conciliation agreement the employment opportunities of its nonminority employees, particularly where, as here, those opportunities have been contractually protected in

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Georgia Power Co., 634 F.2d 929 (5th Cir. 1981) (*Teamsters* did not warrant modification of consent decree where seniority system not bona fide).

a collective bargaining agreement. In *W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. at 771, the Court stated:

> [A]lthough the Company and the Commission agreed to nullify the collective-bargaining agreement's seniority provisions, the conciliation process did not include the Union. Absent a judicial determination, the Commission, not to mention the Company, cannot alter the collective bargaining agreement without the Union's consent.

See also, *Stotts*, slip op. 6 n.3 (O'Connor, J., concurring) ("[I]f innocent employees are to be required to make any sacrifices in the final consent decree, they must be represented and have had full participation rights in the negotiation process.").

In the present case, the abridgement of the rights of non-minority employees is particularly striking, for here the union representing all of the employees intervened of right, thereby agreeing to be bound by the court's judgment, and strenuously objected to the entry of the consent degree. Nevertheless, the court entered the decree. The court did not adjudicate the lawfulness of the provisions of the decree abrogating portions of the union's collective bargaining agreement and significantly disadvantaging its non-minority members. The court issued no findings of fact or conclusions of law. None of the procedures generally required by due process were followed. All of this was dispensed with because the judgment was labeled a "consent" decree. But this label is a misnomer because those who must bear the brunt of the decree, the union and the non-minority employees, did not consent.

The court of appeals' decision sanctioning this procedure is squarely in conflict with a string of employment discrimination decisions handed down by the Fifth Circuit. In *Wheeler* v. *American Home Products Corp.*, 582 F.2d 891, 896 (1977), the Fifth Circuit held that it was improper for the district court to dismiss a Title VII suit with prejudice as part of a settlement agreement to which intervening employees objected. Likewise, in *High* v. *Braniff Airways, Inc.*, 592 F.2d 1330 (5th Cir. 1979),

the court of appeals reversed a portion of a consent decree in an employment discrimination case that was entered over the union's objection. After concluding that the union had not consented (see *id.* at 1334), the court held that the disputed provision could not be sustained as a nonconsensual judgment because, contrary to *Teamsters* and *Franks*, there was no showing that those benefitted were "being accorded a 'rightful place' on the basis of any individual merit or any discrimination peculiar to them as individuals" (592 F.2d at 1335).

Similarly, in *EEOC* v. *Safeways Stores, Inc.*, 714 F.2d 567, 576-580 (5th Cir. 1983), cert. denied, No. 83-1257 (May 21, 1984), the court held that a provision of a Title VII conciliation agreement calling for the retroactive award of seniority violated the collective bargaining agreement and could not properly be enforced unless the union consented or the merits of its claims were properly adjudicated.[20]

The elementary principle recognized in these cases is now increasingly ignored by other circuits in employment discrimination cases. See, *e.g.*, *Kirkland* v. *New York State Department of Correctional Services*, 711 F.2d 1117, 1126 (2d Cir. 1983); *Stotts* v. *Memphis Fire Dept.* (*Stotts II*), 679 F.2d 579, 584 n.3 (6th Cir. 1982); *Stotts*

[20] The decision in the present case is also inconsistent with *United States* v. *City of Miami*, 664 F.2d 435 (5th Cir. 1981). In that case, the en banc Fifth Circuit held that a consent decree binding upon a defendant union in an employment discrimination suit could be entered over the union's objection only "[i]nsofar as the decree does not affect the nonconsenting party and its members" (*id.* at 442). The court concluded (*id.* at 442-447) that the union was affected by the decree to the extent that provisions of its contract were altered. Eleven of the 24 judges would have held that the union was not bound in any way by the judgment, since the union had not consented and the case had not been properly adjudicated (*id.* at 448-453 (Gee, J., dissenting)).

In the present case, the "consent" judgment altered the criteria for promotion in the collective bargaining agreement (see page 3, *supra*) and thus, under *City of Miami*, could not be entered over the union's objection. See also *Newman* v. *Graddick*, 740 F.2d 1513, 1518 (11th Cir. 1984).

v. *Memphis Fire Dept.* (*Stotts I*), 679 F.2d 541, 554 (6th Cir. 1982), rev'd on other grounds, No. 82-206 (June 12, 1984); *Dawson* v. *Pastrick*, 600 F.2d 70, 74-76 (7th Cir. 1979); *Airline Stewards* v. *American Airlines, Inc.*, 573 F.2d 960, 964 (7th Cir. 1978); see also *United States* v. *City of Miami*, 664 F.2d 435, 461-462 (5th Cir. 1981) (Johnson, J., concurring and dissenting in part, joined by six other judges). However, no valid justification for this procedure has been offered.

It has been stated that an objecting union or nonminority employee may not resist entry of a consent decree if the court concludes (albeit without following the procedures that would be required before entering judgment in a contested case) that the decree does not unlawfully affect the intervenor's rights. See *Kirkland*, 711 F.2d at 1126; *United States* v. *City of Miami*, 664 F.2d at 462 (Johnson, J., concurring and dissenting in part); *Stotts II*, 679 F.2d at 584 n.3. This argument begs the question. It justifies the failure to adjudicate the lawfulness of the relief awarded in the decree by assuming at the outset that the relief is lawful. See *United States* v. *City of Miami*, 664 F.2d at 452 (Gee, J., concurring and dissenting in part, joined by 10 other judges).

A second argument advanced to support nonconsensual "consent" decrees is that a rule enabling the union, nonminority or employees to veto a proposed consent decree would hamper efforts to settle Title VII cases. *Kirkland* v. *New York State Department of Correctional Services*, 711 F.2d at 1126; *Dawson* v. *Pastrick*, 600 F.2d at 75-76; *Airline Stewards*, 573 F.2d at 963-964. But the policy favoring voluntary settlement does not justify "ramming a settlement between two consenting parties down the throat of a third and protesting one."[21] *United*

[21] In *Stotts*, Justice O'Connor outlined the procedure that should be followed when Title VII plaintiffs wish to explore the possibility of a settlement that may adversely affect the rights of a union and its members. Justice O'Connor wrote (slip op. 6 (concurring) (footnote omitted)): "[I]n negotiating the consent decree, re-

States v. *City of Miami*, 664 F.2d at 451 (Gee, J., concurring and dissenting in part); see *Stotts*, slip op. 7 n.4 (O'Connor, J., concurring).

Finally, it has been suggested that unions and employees who object to a proposed Title VII "consent" decree are not due anything more than an opportunity to voice their objections before the decree is entered. See, *e.g.*, *Kirkland*, 711 F.2d at 1126; *Airline Stewards*, 573 F.2d at 964. This argument amounts to the contention that due process is satisfied if a party is given a right of allocution before judgment is pronounced.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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spondents could have sought the participation of the union [and] negotiated the identities of the specific victims with the union and employer * * *." Neither of these prerequisities—meaningful participation by the union or the development of victim-specific relief—was satisfied in this case. Quite to the contrary, a "consent" decree awarding preferences to non-victims was approved by a federal district court and upheld by a court of appeals over the objection of the party most directly disadvantaged.

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